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IN THE

Supreme Court of the United States

October Term 1970

No. 70-256 ~~18001~~

TOMAS AGUIRRE, JR., APOLINAR COMPEAN, and WILHELM SEAFOODS, INC., *Petitioners*

v.

CITIZENS CASUALTY COMPANY OF NEW YORK, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes, Federal Rules and Regulations Involved	2
Statement	2
Reasons for Granting the Writ	4
Conclusion	6
Proof of Service	6
Appendix:	
Opinion of the United States District Court	7
Opinion of the United States Court of Appeals, Fifth Circuit	12

LIST OF AUTHORITIES

CASES	Page
Fireman's Fund Insurance Company v. Wilburn Boat Company, 5th Cir., 300 F.2d 631	5
Gulfstream Cargo, Ltd. v. Reliance Insurance Company, 5th Cir., 1969, 409 F.2d 974	5
Saskatchewan Government Office v. Spot Pack, Inc., 5th Cir., 1957, 242 F.2d 385	5
Tropical Marine Products, Inc. v. Birmingham Fire Insurance Company, 5th Cir., 1957, 247 F.2d 116	5
Wilburn Boat Company v. Fireman's Fund Insurance Company, 1955, 348 U.S. 310	4, 5
TEXTS	
Baer, Admiralty Law of the Supreme Court, 262 et seq. (2nd Ed. 1969)	5

IN THE

Supreme Court of the United States

October Term 1970

No. _____

TOMAS AGUIRRE, JR., APOLINAR COMPEAN, and WILHELM SEAFOODS, INC., *Petitioners*

v.

CITIZENS CASUALTY COMPANY OF NEW YORK, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Tomas Aguirre, Jr., Apolinar Compean, and Wilhelm Seafoods, Inc., Petitioners, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on March 26, 1971.

OPINIONS BELOW

The opinion of the District Court for the Southern District of Texas, Brownsville Division is unreported. A copy of this opinion is appended to this petition at the Appen-

dix p. 7. The opinion of the Court of Appeals for the Fifth Circuit is not yet officially reported but a copy of that opinion is appended hereto at the Appendix p. 12.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on March 26, 1971, a copy thereof is appended to this petition in the Appendix at p. 12. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

The question presented is whether or not the Fifth Circuit was correct in determing that coverage under a policy of marine insurance is suspended during the continuance of a breach of an express warranty contained in the policy; and that a loss occurring during the continuance of the breach of an express warranty is not covered whether or not the breach is causally related to the loss.

STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED

There are no Federal rules, regulations or statutes involved in this litigation.

STATEMENT

On April 8, 1968, the O/S MISS ESMERALDA, a wooden-hulled shrimp boat operating out of Port Isabel, Texas, went aground near Port Mansfield, Texas. Subsequent salvage efforts were successful and the vessel was ultimately repaired and returned to fishing. At the time of its grounding, the crew of the MISS ESMERALDA con-

sisted of two men. One of the owners, Apolinar Compean, knew that the vessel was fishing two-handed.

At the time of the grounding the vessel was insured by Citizens Casualty Company of New York. The owners of the vessel were Apolinar Compean and Tomas Aguirre. The third petitioner, Wilhelm Seafoods, Inc., was a loss payee on Citizen's policy by reason of the fact that Wilhelm Seafoods was the holder of a First Preferred Ship Mortgage on the O/S MISS ESMERALDA.

Respondent, Citizens Casualty Company of New York, denied liability for the damages on the grounds that by allowing the vessel to operate with two men rather than three, the owners of the vessel had breached an express warranty, "Warranted that at the inception of the policy the vessel shall be in a seaworthy condition and, thereafter, during the currency of this policy, the assured shall exercise due diligence to keep the vessel seaworthy, and in all respects fit, tight and properly manned, equipped and supplied." App. pp. 9, 14.

Suit was instituted by Petitioners in the Southern District of Texas, Brownsville Division. Judge Garza found Citizens Casualty Company of New York liable for the damages resulting from the grounding of the MISS ESMERALDA. His Memorandum Opinion appears in the Appendix at pages 7-11.

Citizens Casualty Company of New York appealed to the Fifth Circuit Court of Appeals which reversed the trial court's judgment basically on the grounds that Judge Garza's fact findings had been clearly erroneous. The Fifth Circuit Opinion is part of the Appendix at pages 12-19.

While the Fifth Circuit Court of Appeals found that the MISS ESMERALDA was unseaworthy at the time of the grounding because of the inadequacy of its crew, implicit in the Court's opinion is the holding that if there has been a breach of an express warranty in a marine insurance policy that coverage is suspended during the period of that breach whether or not the subsequent loss was caused by the breach of the warranty. In the last paragraph of its opinion, the Fifth Circuit dismisses the case of *Wilburn Boat Company v. Fireman's Fund Insurance Company,* 1955, 348 U.S. 310, by saying, "Finally we conclude that *Wilburn Boat Company v. Fireman's Fund Insurance Company,* 1955, 348 U.S. 310, is inapposite to the present controversy." App. p. 19.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the Fifth Circuit should be reviewed because it erroneously failed to apply the standard for interpreting warranties in marine insurance policies set forth in the case of *Wilburn Boat Company v. Fireman's Fund Insurance Company,* 1955, 348 U.S. 310; and, therefore, the decision is in conflict with the *Wilburn Boat Case.* Alternatively, if the Fifth Circuit's decision is not in conflict with Wilburn, review should be granted because of the issue involved in determining the standard to be applied in interpreting warranties in marine insurance policies is an issue of far reaching importance which should be met. In either circumstance, the United States Supreme Court should review the lower decision.

The Fifth Circuit at the conclusion of its opinion stated rather cryptically, "The seaworthiness standard is solidly entrenched in federal maritime jurisprudence." App. p. 19.

This is an effort to avoid running afoul of the *Wilburn Boat Case* which held that the laws of the State of Texas, where the loss in the *Wilburn Boat Case* took place, should be looked to in determining the effect of the breach of the warranty in that case. The Fifth Circuit, in the instant case, has fashioned a Federal Rule of interpretation contrary to the holding in the *Wilburn Boat Case* by holding that there is a judicially fashioned rule that breach of an express warranty suspends coverage regardless of the existence of a causal connection between the breach and the loss.

Alternatively, the issue of interpretation of warranties contained in marine insurance policies is an area of the law that is subject to confusion. cf. Baer, *Admiralty Law of the Supreme Court*; 262 et seq. (2nd Ed. 1969). Courts at every level have had difficulty with this area and have used ingenious methods to avoid meeting the issue head on. *Gulfstream Cargo Ltd. v. Reliance Insurance Company,* 5th Cir., 1969, 409 F.2d 974; *Tropical Marine Products, Inc. v. Birmingham Fire Insurance Company,* 5th Cir., 1957, 247, F.2d 116; *Saskatchewan Government Office v. Spot Pack, Inc.,* 5th Cir., 1957, 242 F.2d 385; and *Fireman's Fund Insurance Company v. Wilburn Boat Company,* 5th Cir., 1962, 300 F.2d 631. Marine insurance policies such as the one in the present case are written on a nation-wide level, yet the effect of the language contained in these policies may be determined by looking to the law of the state, or by looking to some nebulous Federal standard. The uncertainty involved in this area is a real problem which occurs daily. The effect of this confusion and the time spent by both Federal and state courts in this area can be readily determined by ex-

amining the number of citations under the *Wilburn Boat Case* in Shepard's Citations. Clearly, this is an area appropriate for the Court to exercise its discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

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PROOF OF SERVICE

I, John Wm. Black, attorney for the Petitioners herein and a member of the Bar in the Supreme Court of the United States, hereby certify that on the 7 day of June, 1971, I served three copies of the foregoing Petition for a Writ of Certiorari on Mr. Gordon L. Briscoe, Esq., Post Office Box 2664, Harlingen, Texas 78550, by mailing the same in a properly addressed envelope with postage prepaid.

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APPENDIX

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

TOMAS AGUIRRE, JR., APOLINAR COMPEAN and WILHELM SEAFOODS, INC., Plaintiffs,

vs.

CITIZENS CASUALTY COMPANY OF NEW YORK, Defendant,

CIVIL ACTION NO. 69-B-30

Cox, Wilson, Duncan & Black (John Wm. Black) of Brownsville, Texas, for the Plaintiffs.

Adams, Graham, Lewis, Jenkins & Briscoe (Gordon L. Briscoe) of Harlingen, Texas, for the Defendant.

(Filed May 12, 1970)

MEMORANDUM

This is a suit for damages under a marine hull policy to the shrimp trawler the O/S MISS ESMERALDA, which damages occurred as a result of its grounding about one mile south of Port Mansfield, Texas, on April 8, 1968.

The O/S MISS ESMERALDA is owned by Plaintiffs Tomas Aguirre, Jr. and Apolinar Compean. A First Pre-

ferred Ship's Mortgage was held at the time by Wilhelm Seafoods, Inc., a Texas corporation, and also a party plaintiff. The Defendant, Citizens Casualty Company of New York, is a New York corporation and was licensed to do business in the state of Texas. On May 16, 1967, the Defendant issued to Plaintiffs its A.H.A.B. form of marine insurance, policy #M50-09789, insuring the O/S MISS ESMERALDA. The policy in question was in full force and effect at the time and all premiums had been duly paid.

The insured vessel of the Plaintiffs left its home port of Port Isabel, Texas, on April 6, 1968, to fish for shrimp off of the Texas coast from around Port Mansfield to Aransas Pass, Texas. It was manned by a two man crew, consisting of the Captain, Miguel Reyes, Jr. and Atanacio (Tanis) Villanueva. One of the owners, Apolinar Compean, was at the dock when the vessel left on its fatal voyage and was aware that the vessel had sailed two-handed. The deposition testimony of Miguel Reyes, Jr., the Captain, was introduced at the trial of this cause. The O/S MISS ESMERALDA at first fished for shrimp some ten miles off the coast in the area of Port Mansfield, Texas. On the morning of April 8, 1968, the Captain decided to start trawling for shrimp closer to shore and the evidence shows that it was doing this about a mile or mile and a half from the shore and parallel to the shore, in the area of the entrance to Port Mansfield, Texas. Around 11:00 A.M. on that date, a thick fog covered the area that the O/S MISS ESMERALDA was fishing. A test with a try net showed no signs of shrimp in the area and Captain Reyes decided to quit fishing and ordered the other member of the crew to raise the boards, so that they could go into Port Mansfield because the fog was very thick. He

had been fishing parallel to the shore and he changed his course to the southeast, away from the coast line. He put the O/S MISS ESMERALDA on automatic pilot and he has testified that at the time, his vessel was sailing in four fathoms of water. The Captain left the pilothouse and went to the back of the boat to help the other crewman, "Tanis", bring the boards up, even though "Tanis" could have brought up the boards by himself by the use of the winch.

From the evidence before me, I find that the Captain did not intend to bring the nets onto the boat, but was only raising the doors to the end of the outriggers. Apparently, the board on the starboard side was slower in coming up than the one on the left, and as is usual in these cases, the boat veered to the right and headed toward shore. Captain Reyes was aware of this change in his vessel's course, but stayed on the back deck helping the rigman ". . . because I felt confident that we were some distance from the shore at the time".

The vessel had only drifted on a changed course some two or three minutes when a bump was felt when the boat went aground, a very short distance from the beach. There is no question but that Captain Reyes was negligent in navigating too close to the shore in the thick fog that existed at the time, and that this negligence was the proximate cause of the damages to the O/S MISS ESMERALDA.

The policy in question contained the following express warranty: "Warranted that at the inception of this policy, the vessel shall be in a seaworthy condition and thereafter, during the currency of this policy, the assured shall exercise due diligence to keep the vessel seaworthy and in all

respects, fit, tight and properly manned, equipped and supplied".

The Defendant asks this Court to find that this warranty was breached by the Plaintiffs when they allowed their vessel to go to sea with only two crew members, and that the O/S MISS ESMERALDA was unseaworthy, as a matter of law; in the alternative, they say that if it was not unseaworthy as a matter of law and therefore not covered by the policy in question, that the failure to have more than two crewmen on board was the proximate cause of the grounding.

This Court has previously held that a two man crew on a shrimp vessel such as the O/S MISS ESMERALDA does not make such vessel unseaworthy as a matter of law, for all purposes and in all respects. See *Gulf Coast Trawlers, Inc. v. Resolute Insurance Company,* 239 Fed. Sup. 424.

At the time of the grounding of the O/S MISS ESMERALDA, the evidence shows that it was traveling some five miles per hour, and in the two or three minutes that the vessel was in a changed course, it could not have traveled the distance to the beach that the Captain says the vessel was when it changed course. The only conclusion that can be reached is that the vessel was much closer to the shore than the Captain has indicated. With the fog the way it was, they could not visually see the shore and as has been said, the Captain was negligent in navigating the vessel in such close proximity to the shore under the conditions then existing. This was the cause of the damages and not the failure to have a third man on board. Even if Captain Reyes had been at the wheelhouse,

his confidence in his distance from the beach would have been misplaced and the grounding would have occurred.

It has been stipulated that the owners have paid Six Thousand and No/100 ($6,000.00) Dollars in reasonable sue and labor expenses, to salvage the vessel, and the reasonable costs of repairs to damages caused by the grounding was the sum of Twenty-Nine Thousand Six Hundred Twenty-One and 91/100 ($29,621.91) Dollars. The vessel was not a total loss and the One Thousand and No/100 ($1,000.00) Dollars deductible clause is applicable.

Counsel for the Plaintiffs will prepare a judgment for entry in accordance with this Memorandum, with interest from the date of judgment. All costs are taxed against the Defendant.

These constitute the findings of fact and conclusions of law of the Court.

The Clerk will send a copy of this Memorandum to counsel for the parties.

DONE at Brownsville, Texas, this 12th day of May, 1970.

REYNALDO G. GARZA
Reynaldo G. Garza
United States District Judge

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30364

TOMAS AGUIRRE, JR., APOLINAR COMPEAN and WILHELM SEAFOODS, INC., Plaintiffs-Appellees,

versus

CITIZENS CASUALTY COMPANY OF NEW YORK, Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

(March 26, 1971)

Before WISDOM, THORNBERRY and DYER, Circuit Judges.

DYER, Circuit Judge: Citizens Casualty Company, a marine insurer, appeals from the District Court's judgment awarding damages to Thomas Aguirre, Jr., Apolinar Compean, and Wilhelm Seafoods, Inc., for the grounding of their shrimper *O/S Miss Esmeralda*. The insurer argues that the owners' operation of the *Miss Esmeralda* with a two-man crew made the vessel unseaworthy at the time of the accident. Consequently, Citizens contends, the trial court erred in failing to hold that the owners' breach

of the express warranty of continuing seaworthiness in their AHAB marine hull insurance policy suspended coverage and relieved the insurer of liability for damages, regardless of whether or not the breach contributed to the grounding. We reverse.

On April 6, 1968, the *Miss Esmeralda* sailed from Port Isabel, Texas, to trawl for shrimp in the Gulf of Mexico. When she weighed anchor, the shrimper was manned by two men, Captain Reyes and Atanacio ("Tanis") Villanueva. Although the vessel usually carried a three-man crew, it had been manned by two men on three previous trips in 1968. At least one of the owners, Compean, knew that the *Miss Esmeralda* would be two-handed during the April voyage; indeed, he arranged for Tanis to accompany Reyes.

For two days the *Miss Esmeralda* fished approximately ten miles off the coast near Port Mansfield, Texas. On the morning of April 8, Reyes decided to trawl closer to shore. The vessel began operating on a south southeast-north northwest course parallel to the coast and one to one-and-one-half miles offshore. About 11 a.m. a thick fog blanketed the area where the *Miss Esmeralda* was trawling. After a test with a try net produced no signs of shrimp, Reyes decided to quit fishing. He ordered Tanis to raise the boards and nets, so that they could put into Port Mansfield. Reyes changed course from south southeast to southeast, away from the beach. He engaged the automatic pilot and left the wheelhouse to help Tanis raise the boards.

Soon after he began working with Tanis, Reyes noticed that the trawls on the starboard side of the vessel were not coming out of the water as rapidly as those on the

port. The starboard boards, in the water two or three minutes longer than the port, acted as a rudder causing the boat to veer to the southwest and toward the shore. Whether Reyes was cognizant of this change in course is disputed, but he remained at the stern to assist Tanis "because I felt confident that we were some distance from the shore at the time." The captain's confidence was short-lived; for two or three minutes after the vessel headed southwest, *she ran aground a short distance from the beach.*

Subsequently arrangements were made to salvage the *Miss Esmeralda.* After extensive repairs she returned to shrimping. The parties do not dispute the cost of the repairs or the sue and labor expense. The insurer denies liability solely on the basis of its policy, which contains an express warranty of seaworthiness. According to the policy, it is "warranted that at the inception of this policy the vessel shall be in a seaworthy condition and, thereafter, during the currency of this policy, the assured shall exercise due diligence to keep the vessel seaworthy, and in all respects fit, tight, and properly manned, equipped and supplied." The insurer contends that operation of the *Miss Esmeralda* with two, rather than three, men rendered her unseaworthy. Thus, by virtue of the owners' breach of the express warranty, coverage under the policy was suspended or avoided during the *Miss Esmeralda's* ill-fated voyage. At least, the insurer argues, coverage was suspended during those periods between April 6 and April 8 when the shrimper was engaged in operations requiring a three-man crew. If breach of the express warranty automatically suspended coverage under the policy, the question whether unseaworthiness proximately caused or contributed to the grounding becomes irrelevant. *Gulfstream Cargo, Ltd. v. Reliance Insurance Co.,* 5 Cir.

1969, 409 F.2d 974, 983 n.28; *see Tropical Marine Products, Inc. v. Birmingham Fire Insurance Co.*, 5 Cir. 1957, 247 F.2d 116, 122-23, *cert. denied*, 355 U.S. 903; *Saskatchewan Government Insurance Office v. Spot Pack, Inc.*, 5 Cir. 1957, 242 F.2d 385, 388.

Unseaworthiness is a condition. How that condition arose, whether by negligence or otherwise, is irrelevant to the owner's liability for personal injury or damage resulting from it. *USNER v. Luckenbach Overseas Corp.*, 1971, ____ U.S. ____, ____. In this sense, the owner's responsibility for unseaworthiness is a species of liability without fault. *Boudoin v. Lykes Brothers S.S. Co.*, 1955, 348 U.S. 336, 338. While his warranty of seaworthiness does not mean that his ship can weather all storms, it does indicate that the vessel is reasonably fit for the intended use. *See Boudoin v. Lykes Brothers S.S. Co. supra* at 339. There is no reason to distinguish, for purposes of the warranty, between the ship and the gear on the one hand and the ship's personnel on the other. *Waldron v. Moore-McCormack Lines, Inc.*, 1967, 386 U.S. 724, 727; *Boudoin v. Lykes Brothers S.S. Co., supra* at 339. An inadequate crew, whether for the entire voyage or for a particular task on that voyage, is a classic example of an unseaworthy condition. *Waldron v. Moore-McCormack Lines, supra* at 727-28; *June T, Inc. v. King*, 5 Cir. 1961, 290 F.2d 404, 406. That this condition is merely transitory is irrelevant with regard to the owner's liability for damage which occurs during its tenure. *See USNER v. Luckenbach Overseas Corp., supra* at ____; *Waldron v. Moore-McCormack Lines, supra* at 727 & n.5; *Mitchell v. Trawler Racer, Inc.*, 1960, 362 U.S. 539, 549.

Determining the seaworthiness of a vessel at a particular moment in time is the responsibility of the trier

of fact. *Gulfstream Cargo, Ltd. v. Reliance Insurance Co., supra* at 980; *June T Inc. v. King, supra* 406-07; *see Waldron v. Moore-McCormack Lines, supra.* When sitting without a jury, the trial judge's findings as to seaworthiness are protected by the "clearly erroneous" rule from appellate disapprobation. *Gulfstream Cargo, Ltd. v. Reliance Insurance Co., supra* at 980; *Hanover Fire Insurance Co. v. Holcombe,* 5 Cir. 1955, 223 F.2d 844; 845-46; *cert. denied,* 350 U.S. 895; *see June T, Inc. v. King, supra* at 405; Fed. R. Civ. P. 52. However, having carefully considered all the evidence and testimony presented in this controversy, we are "left with the definite and firm conviction that a mistake has been committed." *Hanover Fire Insurance Co. v. Holcombe, supra* at 846 & n.1 (Rives, J., dissenting). We hold that under these circumstances the insurer has sustained its burden of proving that the vessel was unseaworthy, because of insufficiency of crew, at the time she ran aground. *See Saskatchewan Government Insurance Office v. Spot Pack, Inc., supra* at 389; *Hanover Fire Insurance Co. v. Holcombe, supra* at 846; *Ideal Cement Co. v. Home Insurance Co.,* 5 Cir. 1954, 210 F.2d 937, 938.

Here the pertinent sequence of events begins with the failure of the starboard boards to leave the water as quickly as the port trawls. Acting as a rudder, the starboard boards impelled the *Miss Emeralda* to veer toward the beach. The District Judge found that Reyes was cognizant of the shrimper's change in course prior to her grounding. Therefore, he concluded, Reyes' negligence was the proximate cause of the grounding. According to the District Judge, the vessel was seaworthy, since raising the boards and nets is ordinarily a job for one man. We cannot accept this rationale for determining

that the insurer was liable under its policy. First, we find nothing in the record to substantiate the statement that Reyes knew of the change in course before the accident. Indeed, the only reasonable implication derivable from his testimony is that the captain perceived nothing unusual until he felt a "bump". Immediately he and Tanis ran to the wheelhouse and attempted to move the boat off the beach. Their remedial action was too late, for "[i]t was already too far ashore." At the time the *Miss Esmeralda* was five yards offshore, but Reyes could see only the edge of the beach. Thus neither he nor Tanis had had any opportunity to visually correct Reyes' belief that they were "some distance away from the shore" while they were raising the boards. Moreover, since the shrimper was unequipped with radar, the evident thickness of the fog prevented Reyes' observation of his actual distance from the beach, wherever he stood on the boat.

Second, irrespective of Reyes' purported negligence, the record conclusively discloses that the *Miss Esmeralda* was unseaworthy at the time she ran aground. Although raising the boards may ordinarily be a one-man operation, it certainly became a two-man task under the circumstances sub judice. When the starboard and port boards rose unevenly, Reyes encountered a dilemma. If he returned to the wheelhouse, he risked injury to Tanis or damage to the nets or the vessel. *See, e.g., June T, Inc. v. King, supra* at 406-07. If he remained at the stern, he risked malfunction of the automatic pilot or a course change caused by drag of the starboard nets, and consequent grounding. Confronted by this quasi-Hobson's choice, Reyes decided, whether consciously or unconsciously, to remain at the stern. Necessarily, then, the wheel, compass, and fath-

ometer remained unattended. Reyes testified that if three men comprise the crew, "[w]hen the bad weather is in one remains in the cabin to watch and see if there is another boat coming in or if you are very near the beach. . . . [In foggy weather] many times the captain remains in there." He also stated that to raise the nets smoothly requires two men: if necessary, one can do the job—but not as well or as safely as two. This Court has noted: "What is customary in a trade may be evidence of due care—here the reasonable fitness element on the concept of seaworthiness—but it is not the legal measure of the duty." *June T, Inc. v. King, supra* at 406. It is obvious that under these circumstances and at this time, the *Miss Esmeralda* required a three-man crew, two to raise the nets at the stern and one to check the compass and fathometer in the wheelhouse. The inescapable conclusion remains that the vessel was unseaworthy when she ran aground. Consequently the owners' breach of their express warranty of seaworthiness suspended coverage under the insurance policy. The insurer cannot be liable for damage suffered while coverage was suspended. *See, e.g., Tropical Marine Products, Inc. v. Birmingham Fire Insurance Co., supra* at 122-23; *Saskatchewan Government Insurance Office v. Spot Pack, Inc., supra* at 388.

When the owners attempt to shore up the District Court's finding of seaworthiness by distinguishing other two-handed shrimper crew cases, they navigate dire straits. Ostensibly the owners are contending that in spite of the express warranty, coverage under the policy may be suspended or avoided only when unseaworthiness is a proximate cause of personal injury aboard the vessel. Their assertion contradicts the language of *Tropical Marine Products, Inc., supra,* and *Spot Pack, Inc., supra.* In any event,

since Reyes was not endowed with the ability to bilocate, unseaworthiness did exist. Moreover, it is clear that this unseaworthiness and the grounding were causally connected. *June T, Inc., supra,* and *Sams v. Haines,* S.D. Ga. 1969, 299 F. Supp. 746, present the factual converse of this situation. In those cases the master remained in the wheelhouse to protect the vessel; the crewman, trying to perform a task beyond his capability and therefore unsafe, sustained injury. Nevertheless, the legal principles applied to determine seaworthiness in those controversies are identical to the principles which we have utilized here. Certainly the result reached does not depend on the type of injury or damage incurred. *See also Gulf Coast Trawlers, Inc. v. Resolute Insurance Co.,* S.D. Tex. 1965, 239 F. Supp. 424; *Smith v. Seiter,* E.D.N.C. 1964, 225 F. Supp. 282.

Finally we conclude that *Wilburn Boat Co. v. Fireman's Fund Insurance Co.,* 1955, 348 U.S. 310, is inapposite to the present controversy. *See Kossick v. United Fruit Co.,* 1961, 365 U.S. 731, 742; *Fireman's Fund Insurance Co. v. Wilburn Boat Co.,* 5 Cir. 1962, 300 F.2d 631, 647 n. 12. The seaworthiness standard is solidly entrenched in federal maritime jurisprudence.

The District Court's judgment is

REVERSED.

IN THE

Supreme Court of the United States

October Term, 1970

NO. 70-256

TOMAS AGUIRRE, JR., APOLINAR COMPEAN,
and WILHELM SEAFOODS, INC.,
Petitioners

v.

CITIZENS CASUALTY COMPANY OF NEW YORK,
Respondent

On Petition For A Writ Of Certiorari To The
United States Court of Appeals For
The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Counsel of Record

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statement	2
Argument	2
Conclusion	9
Proof of Service	10

LIST OF AUTHORITIES

CASES	Page
The Caledonia, 157 U.S. 124, 15 S.Ct. 537, 39 L.Ed. 644	6
Continental Insurance Company v. Patton-Tully Transportation Company, 5 Cir., 1954, 212 F.2d 543	8
Dixon v. The Cyrus, 7 Fed. Cas. page 755, No. 3,930	8
Gulf Stream Cargo, Ltd. v. Reliance Insurance Company, 5 Cir., 1969, 409 F.2d 974	5, 8
Ideal Cement Company v. Home Insurance Company, 5 Cir., 1954, 210 F.2d 937	8
Kossick v. United Fruit Company, 1961, 365 U.S. 731	4, 9
McLanahan v. Universal Insurance Co., 26 U.S. 170, 7 L.Ed. 98	5
Mitchell v. Trawler Racer, Inc., 1960, 362 U.S. 539, 80 Sup. Ct. 926	6
The Moslem, 17 Fed. Cas. page 894, No. 9,875	8
Purofied Down Products Corp. v. Travelers Fire Ins. Co., 278 F.2d 439	5

CASES

	Page
Rice v. The Polly & Kitty, 20 Fed. Cas. page 666, No. 11,754	6
Saskatchewan Government Ins. Office v. Spot Pack, 5 Cir., 1957, 242 F.2d 385	7, 8
The Silvia, 171 U.S. 462, 19 S.Ct. 7, 43 L.Ed. 241	8
The Southwark, 191 U.S. 1, 24 S.Ct. 1, 48 L. Ed. 65	8
Tropical Marine Products v. Birmingham Fire Insurance Company of Pennsylvania, 5 Cir., 1957, 247 F.2d 116	7, 8
Union Insurance Company of Philadelphia v. Smith, 124 U.S. 405, 8 Sup.Ct. 534, 31 L.Ed. 497	7
Wilburn Boat Company v. Fireman's Fund Insurance Company, 1955, 348 U.S. 310	3, 4
Wilburn Boat Company v. Fireman's Fund Insurance Company, 5 Cir. 1962, 300 F.2d 640, cert. den. 370 U.S. 925	4, 6

TREATISES

I Parsons on Marine Insurance (1868) 367-400	8

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On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

Citizens Casualty Company of New York, Respondent, says that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, heretofore filed in this cause, should be denied, and would show the Court as follows:

OPINIONS BELOW

The opinion of the District Court for the Southern District of Texas, Brownsville Division (Petitioners' Appendix, pages 7-11) is unreported. The opinion of the Court of Appeals for the Fifth Circuit (Petitioners' Appendix, pages 12-19) is not officially reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether Petitioners' breach of the express warranty of continuing seaworthiness, contained within the policy of marine hull insurance in question, suspended coverage under such policy and relieved Respondent of liability for the damages to Petitioners' vessel resulting from its grounding.

STATEMENT

The facts of the case are stated fully in the decision of the United States Court of Appeals for the Fifth Circuit (Petitioners' Appendix, pages 12-19).

ARGUMENT

1. The Petition is frivolous and without any merit. The decision of the Fifth Circuit is obviously correct, involves no conflict of opinion with either the United States Supreme Court or other United States Courts of Appeal, and presents no other basis for review by this Court. The District Court's finding that, at the time of the loss the vessel was seaworthy, was found and held by the Fifth Circuit to be clearly erroneous. The Fifth Circuit found

both that the vessel was unseaworthy and ". . . that this unseaworthiness and the grounding were causally connected." (Petitioners' Appendix, page 19.) Petitioners do not even question the Fifth Circuit's finding of unseaworthiness nor do they even mention that Court's further finding with regard to the obvious causal connection between the unseaworthiness of the vessel and the grounding.

Under this state of affairs, it is clear that the "questions presented" by Petitioners are merely academic. Had the Fifth Circuit adopted Petitioners' legal rationale, i.e. that Petitioners' claim could be defeated *only* by a finding that the unseaworthy condition contributed to the grounding, the ultimate outcome of this case would have been the same. The Fifth Circuit made the very findings Petitioners would require as a prerequisite to the establishment of non-liability on the part of Respondent; yet, Petitioners do not even question such findings, upon which Respondent would still be entitled to a favorable judgment, even in the event this Court granted the Petition and adopted Petitioners' legal theories.

The Supreme Court of the United States should not be asked to take action both futile and frivolous.

Turning, however, to the "reasons" presented by Petitioners for granting their Petition, we find that two are stated: (1) The Fifth Circuit's decision conflicts with *Wilburn Boat Company v. Fireman's Fund Insurance Company*, 1955, 348 U.S. 310, and (2) Judicial interpretation of warranties in marine insurance policies is difficult and confusing. Petitioners' "reasons" will be briefly considered.

2. The decision of the Court below does not conflict with *Wilburn Boat*. It is important to remember that *Wilburn Boat*, supra, involved alleged breaches of

printed policy terms or "warranties" providing that, without written consent of the Company, the boat could not be sold, transferred, assigned, pledged, hired or chartered, and must be used solely for private pleasure purposes. The policy in question was a marine *fire* insurance policy, and the claim was for damage to the vessel as a result of a *fire*. The concept of "seaworthiness" played no role in *Wilburn Boat,* supra.

Declining to hold that ". . . every term in every maritime contract can only be controlled by some federally defined admiralty rule", 348 U.S. at 313, the Supreme Court held that there was no "judicially established federal admiralty rule governing *these* warranties", 348 U.S. at 314, and that ". . . the scope and validity of the policy provisions *here involved* and the consequences of breaching *them* can only be determined by state law. . ." 348 U.S. at 316.

With the foregoing in mind, it is clear that the decision below is no more in conflict with *Wilburn Boat,* supra, than was *Kossick v. United Fruit Company,* 1961, 365 U.S. 731, involving the question of whether a judicially established federal admiralty rule governed an alleged oral agreement between a seaman and a ship owner respecting maintenance and cure. Holding *Wilburn Boat,* supra, "apposite", the Supreme Court pointed out that: "The application of state law in that case was justified by the Court on the basis of a lack of any provision of maritime law governing *the matter there presented. . .*" 365 U.S. at 742.

Following the third trial, the Fifth Circuit in *Wilburn Boat Company v. Fireman's Fund Ins. Co.,* 5 Cir., 1962, 300 F.2d 640, cert. den., 370 U.S. 925, correctly pointed

out that the Supreme Court ". . . merely held that state law is to be applied in the field of marine insurance only where 'an entrenched federal precedent is lacking' with respect to a specific issue. This is the interpretation which the Supreme Court itself and the Court of Appeals for the Second Circuit has placed on that decision. See Kossick v. United Fruit Company, 365 U.S. 731, 742, 81 Sup. Ct. 886, 6 L.Ed. 2d 56, and Purofied Down Products Corp. v. Travelers Fire Ins. Co., 278 F.2d 439, 441 n. 1." 300 F.2d at 647 n. 12. The Fifth Circuit went on to determine that "Nothing is better established in the field of *marine* insurance than that a mistake or commission material to a marine risk, whether it be willful or accidental, or result from mistake, negligence or voluntary ignorance, avoids the policy", 300 F.2d at 646. The Court found such rule to be ". . . solidly entrenched in our body of federal maritime law (see e.g., McLanahan v. Universal Insurance Company, 26 U.S. 170, 7 L.Ed. 98, 185), . . . (and that it) . . . should apply in the instant case." 300 F.2d at 647 n. 12.

Likewise, in *Gulf Stream Cargo, Ltd. v. Reliance Insurance Company,* 5 Cir., 1969, 409 F.2d 947, the Fifth Circuit determined that concealment of a vessel's unseaworthy condition at the time of the inception of the policy, and the consequent breach of the warranty of seaworthiness implied in the A.I.T.H. Time Policy therein involved, would, under firmly entrenched general maritime legal principles, result in "avoidance" or "suspension" of the marine hull policy in question. 409 F.2d at 980, 981, 983.

Thus, under the foregoing authorities, it is clear that the court below followed and applied the Wilburn Boat doctrine in first determining that the particular warranty

involved in the instant case was governed by long-established, federally defined, admiralty rules. In this regard, we shall see that the court below was entirely correct.

3. The seaworthiness standard, and its conceptual role in marine insurance, is solidly entrenched in federal maritime jurisprudence. Standing in obvious contrast with the relatively immaterial and technical "warranties" involved in *Wilburn Boat,* supra, the seaworthiness standard has been an important concept of federal maritime jurisprudence for generations. As stated by the Supreme Court in *Mitchell v. Trawler Racer, Inc.,* 1960, 362 U.S. 539, 80 Sup. Ct. 926: "The earliest mention of unseaworthiness in American judicial opinions appears in cases in which mariners were suing for their wages. They were required to prove the unseaworthiness of the vessel to excuse their desertion or misconduct which otherwise would result in a forfeiture of their right to wages. See Dixon v. The Cyrus, 7 Fed. Cas. page 755, No. 3,930; Rice v. The Polly & Kitty, 20 Fed. Cas. page 666, No. 11,754; The Moslem, 17 Fed. Cas. page 894, No. 9,875. The other route through which the concept of unseaworthiness found its way into the maritime law was via the rules covering marine insurance and the carriage of goods by sea. The Caledonia, 157 U.S. 124, 15 S.Ct. 537, 39 L.Ed. 644; The Silvia, 171 U.S. 462, 19 S.Ct. 7, 43 L.Ed. 241; The Southwark, 191 U.S. 1, 24 S.Ct. 1, 48 L.Ed. 65; I Parsons on Marine Insurance (1868) 367-400." 362 U.S. at 544, 80 Sup. Ct. at 929, 930.

Over the decades, federal maritime jurisprudence has come to recognize two distinct classes of warranties of seaworthiness in marine hull insurance policies, to each

of which has attached various predictable and established rules and doctrines. In this regard, it is important to distinguish between express warranties of continuing seaworthiness, such as the one contained in the policy in question, written on a 1962 AHAB form, and the rather limited implied warranty of seaworthiness judicially grafted to those forms of marine insurance policies which are completely silent on warranties of seaworthiness. In cases involving the latter, the "American Rule", *Union Insurance Company of Philadelphia v. Smith,* 124 U.S. 405, 8 Sup. Ct. 534, 31 L.Ed. 497, implies for a time policy (which is silent on warranties of seaworthiness) a warranty of seaworthiness as of the very moment of attachment of the insurance. "And, unlike the English Rule which limits the warranty to the commencement of the voyage, the American Rule takes it somewhat further to extend, in point of time, a sort of negative, modified warranty. It is not that the vessel shall continue absolutely to be kept in a seaworthy condition, or even that she be so at the inception of each voyage, or before departure from each port during the policy term. It is, rather, stated in the negative, that the Owner, from bad faith or neglect, will not knowingly permit the vessel to break ground in an unseaworthy condition." *Saskatchewan Government Ins. Office v. Spot Pack,* 5 Cir., 1957, 242 F.2d 385, 388. See also *Tropical Marine Products v. Birmingham Fire Insurance Company of Pennsylvania,* 5 Cir., 1957, 247 F.2d 116, 119. As the Fifth Circuit noted in *Spot Pack,* supra, the consequences of a violation of the limited warranty of seaworthiness implied under the American Rule is ". . . merely a denial of liability for loss or damage caused proximately by such unseaworthiness." 242 F.2d at 388.

In contrast, an express warranty of continuing seaworthiness (such as the one contained in the policy in question) amounts to a ". . . running, continuing obligation . . . a breach of (which) . . . voids the policy altogether. . ." *Saskatchewan Government Ins. Office v. Spot Pack*, 5 Cir., 1957, 242 F.2d 385, 388, 391. Or, as the court below correctly stated: "The inescapable conclusion remains that the vessel was unseaworthy when she ran aground. Consequently the Owners' breach of their express warranty of seaworthiness suspended coverage under the insurance policy. . . The insurer cannot be liable for damage suffered while coverage was suspended. . ." (Petitioners' Appendix, page 18). The above-mentioned *strict* rule, which is applicable to the owners' breach of an express warranty of continuing seaworthiness, is a solidly entrenched, judicially established, federal admiralty doctrine of long standing. See *Gulf Stream Cargo, Ltd. v. Reliance Insurance Company*, 5 Cir., 1969, 409 F.2d 974, 983 n. 28; *Tropical Marine Products, Inc. v. Birmingham Fire Insurance Company*, 5 Cir., 1957, 247 F.2d 116, 122-23, cert. den. 355 U.S. 903; *Saskatchewan Government Ins. Office v. Spot Pack*, 5 Cir., 1957, 242 F.2d 385, 388; *Continental Insurance Company v. Patton-Tully Transportation Company*, 5 Cir., 1954, 212 F.2d 543; *Ideal Cement Company v. Home Insurance Company*, 5 Cir., 1954, 210 F.2d 937. Contrary to Petitioners' contentions, these rules are not confusing or difficult.

4. Policy considerations. The O/S MISS ESMERALDA customarily fished in the Gulf of Mexico, whose waters lapped the shores of five states of the United States as well as two independent nations, the Republics of Mexico and Cuba, respectively. The policy in question

was issued at Jacksonville, Florida, by a New York insurance company in favor of Texas assureds. (App. 13-14). The vessel grounded on the Texas coast, although this could just as easily have occurred on the coasts of Mississippi or Mexico. Obviously, legal rules respecting warranties of seaworthiness in marine hull insurance policies have been, are, and must be uniform, and controlled by one law. As stated by the Supreme Court in *Kossick v. United Fruit Company,* supra: ". . . this is such a contract as may well have been made anywhere in the world and . . . the validity of it should be judged by one law wherever it was made." 365 U.S. at 741.

In dealing with the seaworthiness standard, a concept fundamental to maritime operations, the need for a uniform rule is both clear and great. Shippers and vessel owners must know how to handle their vessels and cargo, respectively, to preserve their insurance. Insurers must know the risks they are assuming when they write policies and fix premium rates. For all of these reasons, it is obvious that the court below was correct in applying solidly entrenched federal maritime legal principles in disposing of the matter in issue.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

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PROOF OF SERVICE

I, Gordon L. Briscoe, attorney for the Respondent herein and a member of the Bar in the Supreme Court of the United States, hereby certify that on the 6th day of ~~July~~ Aug 1971, I served three copies of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari on Mr. John Wm. Black, Esq., Post Office Box 953, Brownsville, Texas 78520, by mailing the same in a properly addressed envelope with postage prepaid.

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